THE JUDICIAL CHARACTERISTICS OF THE LATE LORD BOWEN.

WHEN Lord Bowen died, in 1894, at the comparatively early age of fifty-nine, he had just attained one of the highest official honors of his profession. At the higher and more discriminating bar of professional opinion he had, however, for more than a decade enjoyed an assured pre-eminence. The tribute of Lord Esher, the Master of the Rolls, gives some idea of Lord Bowen's professional standing: —

"I cannot have any doubt that Lord Bowen was one of the most distinguished judges who have sat in the courts of England in my time. His knowledge of the whole law of England was so perfect and so accurate, and the whole law was so much at his command, that I have no doubt that he had studied every head and particular of English law not merely when a particular case involving the proposition came before him, . . . but he had studied the law minutely and earnestly before ever he was called upon to pronounce an opinion upon it. His knowledge of the law was vast; his power of expressing what the law was you have all experienced often. . . . His mind was so beautifully fine and subtle that he delivered perfectly expressed essays upon the law which will be handed down for use by future generations of lawyers."

This high contemporary reputation was attained, too, in the face of some marked limitations. At the common law bar his style and manner were too academic to bring great success as an advocate; and during his brief experience as a *nisi prius* judge he soared too habitually above the heads of the jury to attain the best results from that often obtuse instrument of justice. It was in the Court of Appeal that he found at last his true sphere. Although he came to this tribunal a sufferer from an internal disease which caused him to be frequently absent, during his eleven years' service as Lord Justice of Appeal he delivered a series of judgments which for legal learning and literary grace are unsurpassed in the reports of English law. His subtle intellect, his cultured taste, his unique knowledge of legal history and mastery of the historical method as applied to the evolution of law, and his singular felicity in expounding legal principles, were the rare qualities

which, in spite of marked limitations, gave him the pre-eminent position which he unquestionably attained.

In comparison with the greatest of his contemporaries who were his peers in intellectual power, I should say that he shared with Westbury, Cairns, and Selborne a precision of thought and logical faculty which rendered his mind capable at once of entertaining the broadest views and the most subtle distinctions; but he lacked their versatility. He was the equal of Blackburn and Jessel in legal learning, without the pedantry of the one or the dogmatism of the other. In affinity and contrast Earl Cairns probably furnishes the best comparison. Among the great names just mentioned Cairns and Bowen had no equal in that cultured imagination which is essential to the exercise of the highest art. Earl Cairns has never had an equal, in my opinion, in that intuitive insight into legal principles which make his opinions sound like "an embodiment of the voice of the law stamping its seal upon what is obviously reasonable and just." His judgments were not so much ratiocinations as illuminations. In his mere statements the most complex legal problem passed out of his hands in so simple and clear a light that our wonder is why there should have been any difficulty. Cairns was a genius; Bowen was a scholar. The latter shows us the processes by which he arrives at his conclusions; we may observe the penetration and precision of a severely logical mind, expressed in language clear as crystal, and as luminous as it is subtle. Finally, in spite of physical sufferings to which all but Cairns were strangers, Lord Bowen shared with all these great jurists the habit of patient industry and close application without which intuitions are deceitful and gifts of exposition vain.

Lord Bowen had the very qualities which are most needed in these days of systematic reporting. His work will repay attentive study simply as a demonstration that depth of legal learning and literary grace of style and method are not incompatible. Certainly any distinctive style besides a slovenly one is least common among learned lawyers, and is as rare as it is refreshing in the reports. A conception of intellectual reserve, sense of proportion, and wholesome mental habits of discrimination seem to be quite unknown. Interminable opinions on questions of fact, elaborate restatement of settled principles, and the needless and mechanical citation of all the cases to be found on a given point, — these are the evils at the root of the present deluge of reports. If

one sixth of Lord Bacon's plan to simplify the law — "cases reported with too great prolixity to have their tautologies and impertinences cut off" — were carried into effect, it would make short work of the bulk of contemporary reports.

When we turn, now, to the records and remains by which posterity must judge Lord Bowen, their meagreness is disappointing. It fell to Lord Bowen's lot to be sacrificed for many years to the minotaur of professional practice under conditions which broke his health and frittered away his powers in such ephemeral work as unmasking the claimant for the Tichborne estate. He came, therefore, into the most congenial sphere which fate had ordained for him, a victim to physical sufferings which caused him to be frequently absent from the Court of Appeal. I doubt whether he heard more than five hundred cases during his eleven years' service. Even in these cases it is possible to convey only an imperfect idea of his service, for much of it was impersonal. In accordance with the custom of the Court of Appeal, the Master of the Rolls, who is the presiding judge, or, in his absence, the senior Lord Justice, delivers the opinion of the court. The other Lords Justices in most cases content themselves, if they agree, with simple affirmance, or at most a short supplementary opinion. In probably one half of the cases in which Lord Bowen sat, therefore, he added nothing beyond his simple assent; for during his whole tenure Esher was the spokesman in common law appeals, and Lord Justice Lindley in chancery appeals. Until 1890 he was also junior to Lord Justice Cotton. It appears to be the exception rather than the rule in the Court of Appeal to reserve judgment; but occasionally, when this is done, one of the Justices prepares and delivers, after our method, a written opinion for the court. Many of Lord Bowen's most brilliant opinions were given under such circumstances. During his whole service, however, he delivered the judgment of the court in this way only about twenty times. Furthermore, many of the cases in which he briefly adds his own views are cases where the judgment of the lower court is reversed, on which occasions, in accordance with a polite custom of which Lord Bowen was scrupulously observant, all the judges express their views to a greater or less extent. So that there are no more than one hundred and fifty cases in the reports in which Lord Bowen formulates an independent and comprehensive expression of his own views.

The most obvious characteristic of Lord Bowen's opinions is the

purity, ease, and accuracy of their style. Along with the legal acquirements which he shared with many of his contemporaries, he had what is rare in such minds, a sense of literary form, — "an instinctive preference for the right way of saying a thing, and the literary conscientiousness which impelled him to seek for the best expression of his thoughts." One of his colleagues in the Court of Appeal said of him in this connection: —

"I doubt whether those who listened to or read his brilliant judgments would have the least notion how much thought and persistent effort he had given to them; and the extreme rapidity of his intellectual operations made this all the more remarkable to those who by daily intercourse saw the very pulse of the machine."

In distinction of style his only equal among contemporary writers on legal subjects was Sir Henry Sumner Maine. He had no rival on the bench.

The best single illustration of his style in its perfection is his opinion in the "convent case" of Allcard *v.* Skinner,[1] where the question involved was, to use his own language, "What is the principle, and what is the limitation of the principle, as to voluntary gifts where there is no fraud on the part of the defendant, but where there is an all-powerful religious influence, which disturbs the independent judgment of one of the parties, and subordinates for all worldly purposes the will of that person to the will of the other?"

Characteristic specimens of his colloquial style may be found in Borthwick *v.* Evening Post,[2] Magnus *v.* Queensland National Bank,[3] and Hutton *v.* West Cork Ry. Co.[4]

Turning to the more formal characteristics of his method, we find the same perfection of execution and fine sense of proportion. One may find in his works many aphorisms and lucid definitions which go directly to the heart of an issue and crystallize a principle in a single phrase. Such, for instance, is his remark in a case of deceit that "the state of a man's mind is as much a fact as the state of his digestion,"[5] or his statement that the knowledge of danger on the part of a person is the "vanishing point" of the liability of the occupier of premises.[6] But the power of expressing the most subtle shades of thought and language which made Lord

[1] 36 Ch. D. 189.
[2] 36 Ch. D. 463.
[3] 37 Ch. D. 479.
[4] 23 Ch. D. 654.
[5] Edgington *v.* Fitzmaurice, 29 Ch. D. 459.
[6] Thomas *v.* Quartermaine, 18 Q. B. D. 694.

Chancellor Westbury, for instance, such a master of legal maxims, appears in Lord Bowen's work rather in the production of a total effect or artistic whole. He had great skill, however, in the use of graphic, often humorous illustration. Witness his forcible illustration in the Mogul Steamship Company case,[1] of the expedient of merchants of sowing one year a crop of unfruitful prices in order by drawing competition away to reap a fuller harvest of profits in the future; and his query, in the same case, whether it would be an indictable conspiracy to drink up all the water from a common spring in time of drought. Among other noteworthy instances, see his illustration in Hutton *v.* West Cork Ry. Co.,[2] of sending down all the porters at a railway station to have tea in the country at the expense of the company; his success in laying the issue bare in Thomas *v.* Quartermaine,[3] by his illustration of the builder employed to make repairs; his query in Carlill *v.* Carbolic Smoke Ball Co.,[4] whether every one who sought to find a dog for a reward must sit down and write a note to the owner accepting the proposal; his illustration of being waylaid in Pall Mall, in Magnus *v.* Queensland National Bank;[5] and his reference to the Apostles' spoons in Saunders *v.* Weil.[6]

His general method of procedure in an exhaustive opinion was to state at the outset in a few words the point in issue, and the circumstances under which it arose; then to examine the principles involved; following with the citation of authorities, and, finally, the application of the whole in the decision of the case at issue.[7]

The issue in Mogul Steamship Co. *v.* McGregor[8] is stated thus: —

"We are presented in this case with an apparent conflict or antimony between two rights that are equally guarded by the law, — the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as, for the purposes of the present case, we are to assume some possible damage to the plaintiffs, the real question to be

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[1] 23 Q. B. D. 598. [2] 23 Ch. D. 654. [3] 18 Q. B. D. 694. [4] [1893] 1 Q. B. 265. [5] 37 Ch. D. 479. [6] [1893] 1 Q. B. 474.

[7] Maxim Nordenfelt Gun & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 631; Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 611; Svensden *v.* Wallace, 13 Q. B. D. 69.

[8] 23 Q. B. D. 611.

decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law."

A good illustration of his method, down to the examination of authorities, may be found in Johnstone *v.* Milling: [1] —

"The question which we have to decide arises with regard to the defendant's counterclaim. The claim made by the defendant is upon a covenant [in a lease to him], by which the plaintiff undertook, after the expiration of four years from the commencement of the term, to rebuild the premises upon notice from the defendant to do so. The defendant says that before the time had arrived for the performance by the plaintiff of this obligation he repudiated his liability on the contract, and so conferred an immediate right of action on the defendant. We have, therefore, to consider on what principles and under what circumstances it must be held that a promisee, who finds himself confronted with the declaration of intention by the promisor not to carry out the contract when the time for the performance arrives, may treat the contract as broken, and sue for breach thereof. It would seem, on principle, that the declaration of such intention is not in itself and unless acted on by the promisee a breach of contract; and that it only becomes a breach when it is converted by force of what follows into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and, holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract and he can recover upon it as such. Upon looking to the reason of the thing, it seems obvious that in the latter case the rights of the parties under the contract must be regarded as culminating at the time of the wrongful renunciation of the contract, which must then be regarded as ceasing to exist except for the purpose of the promisee's maintaining his action upon it; it would be unjust and inconsistent with all fairness that the promisee should be entitled to bring his action as upon a wrongful renunciation of contract, and yet to treat the contract as still open and existing as regards the future. Such being the reason of the thing, the authorities seem to be all the same way."

And then he proceeds to examine the authorities and apply them in the decision of the case. It was his invariable method

[1] 16 Q. B. D. 472.

to eliminate with dexterity all superfluous and irrelevant circumstances, to break up complex questions into their simple components, and to narrow the controversy to an issue. Many illustrations might be given of his subtlety in clearing the ground by going straight to the pith of a case, and placing his premises beyond misconception by careful and accurate definition of terms in which there was any possibility of ambiguity.[1]

After the precise issue was found he was also always careful not to go beyond it. A notable example of this is the case of Davies *v.* Davies,[2] where he declined to discuss the subject of restraint of trade because the matter was not directly in issue. A good example of his acuteness in summarizing the exact ground of his decision may be found in a subsequent case involving that issue: —

"The rule as to general restraint of trade ought not, in my judgment, to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the good will of a business in which he is so interested, and for the adequate protection of those who buy it, to covenant that he

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[1] In the case of Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 611, involving the legality of a combination to control trade, he said: —

"We were invited by the plaintiffs' counsel to accept the position from which their argument started, — that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously' and 'wrongfully' and 'injure' are words all of which have accurate meanings well known to the law, but which have also a popular and less precise signification, into which it is necessary to see that the arguments do not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an intent to do wrongful harm; 'maliciously,' in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term 'wrongful' imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible."

See also his opinion delivered before the House of Lords in the great case of Dalton *v.* Angus, 6 App. Cas. 779. Other illustrations of his habit of accurate definition are his distinction between the defences of contributory negligence and a defence resting on the maxim *volenti non fit injuria*, Thomas *v.* Quartermaine, 18 Q. B. D. 691; his remarks on the use of the term "special damage," Ratcliffe *v.* Evans, [1892] 2 Q. B. 524; on the confusion arising from treating cases of dismissal of servants by a master as instances of a rescission of the original contract, Boston Deep Sea Co. *v.* Ansell, 39 Ch. D. 365; on the distinction between an act and its consequences, Harrison *v.* Muncaster, [1891] 2 Q. B. 687; on the incorrect practise of speaking of the right to light as an ordinary easement, Birmingham Banking Co. *v.* Ross, 38 Ch. D. 312; on the vague use of the term "adoption," Falcke *v.* Scottish Insurance Co., 34 Ch. D. 249.

[2] 36 Ch. D. 359.

will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public. This last element in the definition ought not, I think, to be overlooked, for I can conceive cases in which the absolute restraint might, as between the parties, be reasonable, but yet might tend directly to injure the public; and a rule founded on public policy does not admit of any exception that would really produce public mischief; such might be possibly the case if it was calculated to create a pernicious monopoly in articles for English use, — a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important." [1]

In facility and precision of statement of legal propositions leading up to or summarizing an argument, omitting no essential qualification, and expressing neither too little nor too much, Lord Bowen was a master. His clear and comprehensive statement, in Thomas *v.* Quartermaine,[2] of the duty of the occupier of premises, is an excellent illustration of this.[3]

More than a century ago, Burke observed that the practice of the law, though in his view "a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together," does not always, except in the highest order of intellects, "open and liberalize the mind" and is even apt to give a turn to "think the substance of business not to be much more important than the forms in which it is conducted." Judged by this

[1] Maxim Nordenfelt Gun & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 631.

[2] 18 Q. B. D. 694.

[3] In Baroness Wenlock *v.* River Dee Co., 36 Ch. D. 684, Lord Bowen gave the best statement of general corporate powers to be found in the reports. In the course of a singularly lucid opinion, in Abrath *v.* Northeastern Ry. Co., 11 Q. B. D. 455, he simplified the use of the term "burden of proof." In Low *v.* Bouviere, [1891] 3 Ch. 105, he defined estoppel. In Steinman *v.* Angier Line, [1891] 1 Q. B. 621, he showed how the usual exceptions in a bill of lading "limit the liability, not the duty." He summed up his view of the law applicable to contracts in restraint of trade in the following terms in Maxim Nordenfelt Gun & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 631: —

"The result seems to me to be as follows: General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which, the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee. A limit in time does not, by itself, convert a general restraint into a partial one. 'That which the law does not allow is not to be tolerated because it is to last for a short time only.' In considering, however, the reasonableness of a partial restraint, the time for which it is to be imposed may be a material element to consider."

supreme test of intellectual capacity, Lord Bowen has few superiors. Law, to him, was not a mere collection of rules. As he said in one case, "There is no magic at all in formalities."[1] He recognized, to use his own language, the duty of endeavoring to apply legal doctrines so as to meet "the broadening wants or requirements of a growing country, and the gradual illumination of the public conscience." When he cited authorities, it was only to support conclusions which he had already reached by the independent exercise of his judgment. He had no patience with the servile citation of cases to define general terms, which are necessarily relative, and which if finally defined would lose half their efficiency.[2] In dismissing summarily a needless action he said: —

"I regret that we have to add one more to the cloud of cases which are collected around this particular point. The law has been clear for fifty years, and all the cases that have been reported since that time are merely illustrations of the way in which the court applies the principle."[3]

No better example of the triumph of reason and justice over technicalities can be found in the reports than Lord Bowen's opinion in Ratcliffe *v.* Evans.[4] In that case he extracts the spirit from the technical rule, and applies it with unerring precision, to the discomfiture of the counsel who raised it.

In speaking of applying in modern times the ancient rule as to contracts in restraint of trade, he said, in Maxim Nordenfelt Gun & Ammunition Co. *v.* Nordenfelt:[5] —

"A covenant in restraint, made by such a person as the defendant with a company he really assists in creating to take over his trade, differs widely from the covenant made in the days of Queen Elizabeth by the traders and merchants of the then English towns and country places. When we turn from the homely usages out of which the doctrine of Mitchell *v.* Reynolds, 1 P. Wms. 181, sprang, to the central trade of the few great undertakings which supply war material to the executives of the world, we appear to pass to a different atmosphere from that of Mitchell *v.* Reynolds. To apply to such transactions at the present time the rule that was invented centuries ago in order to discourage the oppression of English traders and to prevent monopolies in this country, seems to be the bringing into play of an old-fashioned instrument. In regard,

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[1] Miles *v.* New Zealand Co., 32 Ch. D. 289.

[2] *In re* Young & Harston's Contract, 31 Ch. D. 174; *Ex parte* Griffith, 23 Ch. D. 74.

[3] Green *v.* Humphrey, 26 Ch. D. 479.

[4] [1892] 2 Q. B. 529.

[5] [1893] 1 Ch. 631.

indeed, of all industry, a great change has taken place in England. Railways and steamships, postal communication, telegraphs, and advertisements have centralized business and altered the entire aspect of local restraints on trade. The rules, however, still exist, and it is desirable that they should be understood to remain in force. A great care is evidently necessary not to force them upon transactions which, if the meaning of the rule is to be observed, ought really to be exceptions."[1]

The boldness with which he applied established principles to a new subject matter may be shown by the case of Dashwood *v.* Magniac,[2] where the law applicable to grants of minerals, according to which, under certain circumstances, the consumption of part of the inheritance is held not to be waste, was applied to the periodical cutting of timber by a tenant for life of a freehold estate.[3] It must not be supposed, however, that Lord Bowen failed in respect to general rules which have been found of value in the administration of the law. As he said in Quartz Hill Gold Mining Co. *v.* Eyre:[4] —

[1] See also Jacobs *v.* Crédit Lyonnaise, 12 Q. B. D. 589, and Ratcliffe *v.* Evans, [1892] 2 Q. B. 529.

[2] [1891] 3 Ch. 306.

[3] He supports his conclusion in this case with great force: —

"The absence of authority in the early English law for the extension to timber plantations of the principle in question is, however, a matter on which the appellants are entitled to lay stress. But the Year Books and the older Abridgments are not likely to furnish illustrations in which legal principles are applied to a comparatively modern system of arboriculture. Mining and quarrying have come down to us from the remotest ages; but the culture and periodical cropping of trees such as that proved in the case before us, are the growth of a later period altogether. Occasion to invoke the principle for the benefit of grantees of 'timber estates' arises only in a time when woods are cultivated on the plan of annual croppings, and when to treat them otherwise would be to destroy the revenue of a property and to paralyze its management. . . . We have been told that to apply to timber the doctrine which has been adopted in the case of minerals will be to transfer it to a subject matter where no line can be drawn as marked and unmistakable as the line presented always by the open mine. But it is not a valid objection to a legal doctrine that it will not be always easy to know whether the doctrine is to be applied in a particular case. The law has to face such embarrassments. . . . The instance to which the legal principle is now for the first time adopted by this court may be new, but the principle is old and sound; and the English law is expansive, and will apply old principles, if need requires it, to new contingencies. Just as, in America, the law of watercourses and of waste has modified itself to suit the circumstances of enormous rivers and wide tracts of uncultivated forest, so the English law accommodates itself to new forms of labor and new necessities of culture; it favors the profitable holding of land. In a case like the present, good sense borrows accordingly, as it seems to me, the doctrine which has hitherto found its most remarkable illustration in the instance of the open mine, and applies it to the more novel case of a timber plantation which is cultivated for periodical croppings, and which forms a substantial item of yearly revenue to the owner of the property."

[4] 11 Q. B. D. 688.

"Although every judge of the present day will be swift to do justice, and slow to allow himself as to matters of justice to be encumbered with either precedents or technicalities, still every wise judge who sits to administer justice must feel the greatest respect for the wisdom of the past."

He was ready on proper occasions to sacrifice his personal views. When he was unable to follow authorities which seemed to offer a speedy solution of the controversy, we find none of the coarse dogmatism which mars so much of Sir George Jessel's work. Without any obtrusion of his own personality, he gives his reasons for his action. Thus, in a case involving the construction of a will,[1] he said: —

"Although I do not disguise from myself that many judges . . . have used language to the effect that you must, before you can include under the name which the law usually appropriates to a legitimate tie persons who stand outside that strict line, find a necessary inference, or a very clear intention to that effect, it seems to me that the only weight one can give to such language is to treat it not so much as a canon of construction as a counsel of caution to warn you, in dealing with such cases, not to give way to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lead a reasonable man to a distinct conclusion. But I protest, that as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the true construction is, and what the true intention expressed by the testator is, then your journey is performed. You require no more counsellors to assist you; and after once arriving at the journey's end, to pause in giving effect to the true interpretation because, forsooth, the language has not been framed according to some measure or standard of correct expression, which is supposed to be imposed by judges out of regard for social or other reasons, appears to me to be using the language of such learned judges, not as laying down canons for construing a will, but as justifications for misconstruing it."

It is obviously impossible to give within the limits of a magazine article the substance of Lord Bowen's work, and I shall content myself with indicating those cases which best illustrate his methods. Any classification of forms of argument is necessarily tentative. A judgment may either contain in itself both principle and application, or it may express or even suggest only one of these, leaving the other to be implied. But whatever the outward

[1] *In re* Jodrell, 44 Ch. D. 614.

form of the argument may be, — whether pure development of principle without the citation of a single authority (Allcard *v.* Skinner[1]), or elaborate analysis and review of a mass of conflicting cases (Phillips *v.* Homfray,[2] Mitchell *v.* Darley Main Colliery Co.[3]), a perfect example of systematic logic (Ratcliffe *v.* Evans,[4] Quartz Hill Gold Mining Co. *v.* Eyre[5]), or a series of detailed answers to specific points urged in argument (Carlill *v.* Carbolic Smoke Ball Co.[6]), statutory construction (Hewlett *v.* Allen,[7] Thomas *v.* Quartermaine[8]), or argument on the facts (Medawar *v.* Grand Hotel Co.,[9] Abrath *v.* Northeastern Ry. Co.[10]), — we invariably find the same characteristic precision, sense of proportion, force and completeness of logic. Whatever the form might be, the result was well described by him in the course of his opinion in *In re* Portuguese, &c. Mines: [11] "As soon as one applies one's mind to dissect the ingenious argument, the light breaks through and makes the case perfectly plain." [12]

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[1] 36 Ch. D. 145.
[2] 24 Ch. D. 439.
[3] 14 Q. B. D. 125.
[4] [1892] 2 Q. B. 524.
[5] 11 Q. B. D. 674.
[6] [1893] 1 Q. B. 256.
[7] [1892] 2 Q. B. 663.
[8] 18 Q. B. D. 685.
[9] [1891] 2 Q. B. 11.
[10] 11 Q. B. D. 440.
[11] 45 Ch. D. 60.

[12] Let me cite an example of simple exposition. In the case of Smith *v.* Land & House Property Corporation, 28 Ch. D. 14, the vendee under a contract for the sale of certain property was resisting an action for specific performance on the ground of misrepresentation, the vendor having stated that the property was let to "a most desirable tenant," when in fact the tenant had been in arrears on his last quarter's rent, and soon afterward went into liquidation: —

"It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to another is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact about the condition of a man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now a landlord knows the relations between himself and his tenant; other persons either do not know them at all or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which *prima facie* the vendors know everything and the purchasers nothing. The vendors state that the property is let to a most desirable tenant, what does that mean? I agree that it is not a guaranty that the tenant will go on paying his rent, but it is to my mind a guaranty of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlord and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact. Was it a true assertion? Having regard to

As models of systematic logic nothing could be more admirable than his opinion in Ratcliffe *v.* Evans,[1] on the basis of the action for malicious falsehood; and his opinion in Quartz Hill Gold Mining Co. *v.* Eyre,[2] as to the circumstances under which an action will lie for the malicious prosecution of a civil action. See also his brief but masterly solution of the issue in British Mutual Banking Co. *v.* Charnwood Forest Ry. Co.[3] These opinions must necessarily be read in their entirety to be appreciated.

His subtlety in the analysis of legal doctrine may be seen to best advantage in Le Lievre *v.* Gould,[4] and Angus *v.* Clifford,[5] where he reviewed the reasoning of the great case of Peek *v.* Derry,[6] which settled the foundations of the action of deceit. What could be clearer, to give a single quotation, than his statement, in Badeley *v.* Consolidated Bank,[7] of the way in which the lower court had gone wrong on an issue of partnership: —

"To my mind, the true test of partnership has been settled by the House of Lords, and by court after court, in a way which leaves it no longer open to discussion. The real test is that which is decided by a catena of cases beginning with Cox *v.* Hickman,[8] and ending, I hope, with this case, though I am not sure of that. The question is whether there is a joint business, or whether the parties are carrying on business as principals and agents for each other. Now where has Mr. Justice Stirling gone wrong? He has gone wrong because he has not followed that test. What he has done is this. He has taken one of the circumstances which in many cases affords an ample guide to truth; he has taken that circumstance as if, taken alone, it shifted the onus of proof, — as if it raised a presumption of partnership, — and then he has looked about over the rest of the contract to see if he could find anything which rebutted that presumption. Now that cannot be a right way of dealing with the case. You have a group of facts, — A, B, C, D, E, and

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what took place between Lady Day and Midsummer, I think that it was not. . . . In my opinion, a tenant who had paid the last quarter's rent by driblets under pressure must be regarded as an undesirable tenant."

Under the same head reference may be made to Davies *v.* Davies, 36 Ch. D. 392, where Lord Bowen showed the impossibility of enforcing a covenant on the part of a retiring partner to retire from the business "so far as the law allows." See also his lucid exposition of the law relating to forbearance of threatened proceedings as a consideration for a compromise in Miles *v.* New Zealand Co., 32 Ch. D. 291; and his statement of what is "new and original" within the meaning of the copyright law in Saunders *v.* Weil, [1893] 1 Q. B. 474.

[1] [1892] 2 Q. B. 529.
[2] 11 Q. B. D. 688.
[3] 18 Q. B. D. 717.
[4] [1893] 1 Q. B. 590.
[5] [1891] 2 Ch. 470.
[6] 14 App. Cas. 337.
[7] 38 Ch. D. 262.
[8] 8 H. L. Cas. 268.

F, — and you want to know the right conclusion to draw from them. The right way is to weigh the facts separately and together, and to draw your conclusion. It is not to take A, and say that if A stood alone it would shift the onus of proof, and then to look over B, C, D, E, and F and see if the remainder of the proof is sufficient to rebut the presumption supposed to be raised. The truth is, that all the cases which go beyond the line, or the test, or the definition, which has been explained once more by Lord Justice Cotton, are cases which depend on exploded fallacies. One fallacy after another has been exploded about the way in which to deal with these partnership cases, and no fallacy has been harder to kill than that about participation in profits. Of course, as the Lord Justice has pointed out, there may be cases in which participation in profits is enough to enable the court to decide the matter, but if you once lay down a principle of law that participation in profits is a determining factor, at that moment you depart from the region of law into the region of fact."

For the application of law to a case as a whole, uniting various methods in the treatment of diverse claims, Maxim Nordenfelt Gun & Ammunition Co. *v.* Nordenfelt,[1] and Mogul Steamship Co. *v.* McGregor,[2] are the best examples of Lord Bowen's work. Indeed, these two opinions are the most brilliant that he ever delivered; and they have the additional interest of dealing with general and timely issues. The former case settled the law relating to contracts in restraint of trade, and the latter laid down the legal limits of trade selfishness by way of combination to suppress competition. Other notable instances of systematic treatment on a large scale are Le Lievre *v.* Gould,[3] on the limits of the law of negligence; Carlill *v.* Carbolic Smoke Ball Co.,[4] an elaborate discussion of the law relating to the formation of contracts; and Hutton *v.* West Cork Ry. Co.,[5] on the powers of the majority over corporate funds.[6]

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[1] [1893] 1 Ch. 631. [2] 23 Q. B. D. 598. [3] [1893] 1 Q. B. 498.
[4] [1893] 1 Q. B. 265. [5] 23 Ch. D. 669.

[6] The cases thus far mentioned have been selected primarily with reference to style and method. For Lord Bowen's substantial contributions to English law, I would cite the following cases: Maxim Nordenfelt Gun & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 631, which settled the law as to contracts in restraint of trade; Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, on the limits of trade selfishness by way of combination to exclude rivals; Thomas *v.* Quartermaine, 18 Q. B. D. 685, on the duty of owners of premises, and the doctrine *volenti non fit injuria;* Le Lievre *v.* Gould, [1893] 1 Q. B. 491, on the limits of the law of negligence; Ratcliffe *v.* Evans, [1892] 2 Q. B. 524, on the evidence admissible to sustain an action for defamation; Finlay *v.* Chirney, 20 Q. B. D. 494, and Phillips *v.* Homfray, 24 Ch. D. 453, on the maxim *actio*

Finally, in addition to the characteristics to which I have adverted, which Lord Bowen shared in degree with his contemporaries, in his knowledge of legal history and mastery in the application of the doctrine of evolution to legal and political philosophy he was unique. "The only reasonable and the only satisfactory way of dealing with English law," he said in an address to law students, "is to bring to bear upon it the historical method. Mere legal terminology may seem a dead thing. Mix history with it, and it clothes itself with life." In the application of this method he treated law and legal history with an acuteness and sympathetic grasp which indeed vitalize his conclusions. English law consists of two well defined elements, the rational or scientific, and the historical, and many errors and much confusion in the administration of the law have been due to an attempt to give a rational or scientific basis to doctrines which owe their origin to historical accidents.[1]

A brief illustration of Lord Bowen's use of this method is the

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personalis moritur cum persona; Dalton *v.* Angus, 6 App. Cas. 779, on the right to subjacent support; Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, on the essential requisites to the formation of a contract; Cochrane *v.* Moore, 25 Q. B. D. 57, on the vexed question of the passing of property by voluntary gift; Smith *v.* Land & House Property Corporation, 28 Ch. D. 7, on actionable misrepresentation; *In re* Hodgson, 31 Ch. D. 177, on the rights in equity of creditors of joint debtors; Quartz Hill Gold Mining Co. *v.* Eyre, 11 Q. B. D. 674, on malicious prosecution as a cause of action; Brunsden *v.* Humphrey, 14 Q. B. D. 141, and Mitchell *v.* Darley Main Colliery Co., 14 Q. B. D. 125, on the doctrine of *res judicatæ;* Jacobs *v.* Crédit Lyonnaise, 12 Q.B. D. 598, on the *lex loci contractus* and *vis major;* Johnstone *v.* Milling, 16 Q. B. D. 460, on the limits of repudiation as a breach of contract; Merivale *v.* Carson, 20 Q. B. D. 275, on the distinction between fair public comment and privileged communications in the law of libel; Newbigging *v.* Adam, 34 Ch. D. 582, on relief in equity in cases of fraud and misrepresentation; Angus *v.* Clifford, [1891] 2 Ch. 449, on actionable misrepresentation; Allcard *v.* Skinner, 36 Ch. D. 145, on undue influence; Speight *v.* Gaunt, 22 Ch. D. 727, on the duties of trustees; Hammond *v.* Bussey, 20 Q. B. D. 93, applying the doctrine of Hadley *v.* Baxendale, 9 Ex. 341; Castellian *v.* Preston, 11 Q. B. D. 397, on the recovery under fire insurance policies; Steinman *v.* Angier Line, [1891] 1 Q. B. 619, on recovery under a bill of lading for loss by theft; Svensden *v.* Wallace, 13 Q. B. D. 69, on the scope of general average contribution; Abrath *v.* Northeastern Ry. Co., 11 Q. B. D. 440, on the nature of the burden of proof; Hutton *v.* West Cork Ry. Co., 23 Ch. D. 654, on the corporate power to remunerate directors for past services; Baroness Wenlock *v.* River Dee Co., 36 Ch. D. 684, on the limits of the corporate capacity to contract; *In re* Portuguese Consolidated Copper Mines, 45 Ch. D. 16, on the doctrine of ratification; British Mutual Banking Co. *v.* Charnwood Forest Ry. Co., 18 Q. B. D. 714, on liability for fraudulent acts of an agent.

[1] As an indication of the value of the historical method in controverted questions, compare Lord Cairns's opinion in Fletcher *v.* Rylands, L. R. 3 H. L. 330, with that of Mr. Justice Doe in Brown *v.* Collins, 53 N. H. 442.

following introduction to his decision in a *nisi prius* action for illegal restraint, in which it was claimed that the landlord had broken an outer door.[1]

"The doctrine of the inviolability of the outer doors of a house and its precinct has long been established by English law. The principle is one which carries us back in imagination to wilder times, when the outer door of a house, or the outer gates and enclosures of land, were an essential protection, not merely against fraud, but violence. The proposition that a man's house is his castle, which was crystallized into a maxim by the judgment in Semayne's case,[2] and by Lord Coke, dates back to days far earlier still, when it was recognized as a limitation imposed by law on all process except that which was pursued at the King's suit and in his name. A landlord's right to distrain for arrears of rent is itself only a survival of one among a multitude of distraints which, both in England and other countries, belonged to a primitive period when legal procedure still retained some of the germs of a semi-barbarous custom of reprisals, of which instances abound in the early English books, and in the Irish Senchus Mor. Later, all creditors and all aggrieved persons who respected the King's peace, the sheriff in a civil suit, and the landlord in pursuit of his private remedy for rent and services, were both of them held at bay by a bolted door or barred gate. To break open either was to deprive the owner of protection against the outer world for his family, his goods and furniture, and his cattle."

His history of the common law doctrine as to restraint of trade in Maxim Nordenfelt Gun & Ammunition Co. *v.* Nordenfelt,[3] is his most elaborate contribution to the historical method. In Finlay *v.* Chirney,[4] he gives a graphic history of the maxim *actio personalis moritur cum persona*. By comparing this opinion with the wholly practical opinion of the Master of the Rolls in the same case, one may observe the advantage of the historical point of view. In Steinman *v.* Angier Line,[5] where the issue was the liability under the bill of lading of a ship owner for goods stolen by the stevedore's men during stowage, Lord Bowen clears up the construction of the exceptions in the bill of lading by a sketch of the history of the introduction into English policies and English bills of lading of special provisions as to "thieves."[6]

[1] American Concentrated Must Corporation *v.* Hendry, 62 L. J. Q. B. 389.

[2] 5 Co. Rep. 91. [3] [1893] 1 Ch. 631. [4] 20 Q. B. D. 502. [5] [1891] 1 Q. B. 621.

[6] Other specimens of this method may be found in Brunsden *v.* Humphrey, 14 Q. B. D. 141; Dalton *v.* Angus, 6 App. Cas. 779; Dashwood *v.* Magniac, [1891] 3 Ch. 306; Hannay *v.* Smurthwaite, [1893] 2 Q. B. 422.

It has been charged that Lord Bowen suffered from excess of intellectual light; that his refinements were often too subtle for application in the practical administration of the law. The Master of the Rolls, for instance, on the occasion to which I have already alluded, plainly intimated as much when he said, "I cannot fail to say that the workings of his mind were so beautifully fine that sometimes what he said escaped me." Without denying that by reason of the compactness of his arguments Lord Bowen's opinions require attentive consideration, the extent of the difficulty experienced by the Master of the Rolls may be observed in Thomas *v.* Quartermaine,[1] where Lord Esher dissented. In the subsequent case of Yarmouth *v.* France,[2] in which the doctrine of Thomas *v.* Quartermaine was involved, Lord Esher examines at length the opinion of Lord Bowen in the latter case, and is still dissatisfied with a line of reasoning which plainly enlists the admiration of Lord Justice Lindley. Another instance of this alleged refinement, in which the merits of the controversy may be compared, is his review of Lord Justice Fry's theory of the law relating to contracts in restraint of trade, in the Maxim Nordenfelt case.[3] See also Miles *v.* New Zealand Co.,[4] where he dissented on the facts. Compare his opinion in Vagliano *v.* Bank of England,[5] and in Pandorf *v.* Hamilton,[6] with the opinions given in the House of Lords reversing his judgment.

No better proof of the practical bent of his mind can be offered than the fact that he seldom found himself in irreconcilable conflict with his colleagues. In his whole career he did not dissent from the opinion of the majority a dozen times. How much of this result was brought about by consultation is, of course, unknown. But we have the testimony of Lord Justice Fry, that "the pains which he took both to do his own part in the administration of justice to the very best of his great abilities, and so far as he could to secure the best workings of the machinery of the law, were infinite. He never wearied of investigating or discussing a point so long as he thought that anything remained to be got at, or that there was any hope of bringing about an agreement of opinion amongst colleagues who were inclined to differ."

On occasion, especially in equity cases, he was ready to yield a reluctant assent to the majority: —

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[1] 18 Q. B. D. 694.
[2] 19 Q. B. D. 654.
[3] [1893] 1 Ch. 631.
[4] 32 Ch. D. 291.
[5] 23 Q. B. D. 243.
[6] 17 Q. B. D. 670.

"The only point on which I have some hesitation is this: I am not certain, if I had been sitting by my own unassisted — I will not say light, but twilight — that I should have come to the same conclusion as to the costs of the trial below. But it is a matter with which my brothers are so much better fitted to deal than I am, that I willingly yield my views about it to theirs." [1]

But when it came to a matter of principle he could be firm and independent, though always extremely courteous.[2] A good illustration is the case of *In re* Cape Breton Co.,[3] where he began a vigorous dissenting opinion by saying: —

"In this case I feel hesitation in differing from my learned brethren, whose knowledge of the doctrines of courts of equity is so much greater than mine, but as I cannot understand the principle upon which relief has been refused, it becomes necessary for me to state my views." [4]

Beneath all his courtesy and gentleness of manner, however, there was the strength of a Blackburn or a Jessel. An unconscionable case or an idle argument never escaped his severity. See, for instance, his opinion in Brown *v.* Burdett,[5] an administration suit, in which "all the oyster had been eaten, and only the shell remained." And in Thomas *v.* Quartermaine,[6] where a senseless construction of the Employers' Liability Act was urged in argument, he disposed of the point in short terms: —

"An enactment which distinctly declares that a workman is to have the same rights as if he were not a workman, cannot, except by violent distention of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman, and other rights in addition. It cannot, in the case of a defect in the employer's works, be distorted into the meaning that a new standard of duty is to be imposed on the employer as regards a workman, which would not exist as regards anybody else. If the language of the section were not even so precise, the point would be concluded, one might well think, by the observation that, if the act had intended to prescribe some new measure of duty, the least one might expect would be that it should define it. What sort of duty could that be which does not exist at law, and which is not

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[1] Tomlin *v.* Luce, 43 Ch. D. 196.

[2] Thomas *v.* Quartermaine, 18 Q. B. D. 685, and Newbigging *v.* Adam, 34 Ch. D. 582.

[3] 29 Ch. D. 806.

[4] For other dissents, in addition to those already mentioned, see Burdick *v.* Sewell, 13 Q. B. D. 159; Rendall *v.* Blair, 45 Ch. D. 139; Dreyfus *v.* Guano Co., 43 Ch. D. 317.

[5] 40 Ch. D. 267.

[6] 18 Q. B. D. 685.

defined by statute? It would be a duty that had no limits, except the benevolence of a jury exercised at the expense of the pockets of other people."

The truth is, that Lord Bowen's unusual intellectual acquirements were well balanced by good sense. He was continually using the terms common law and common sense as equivalents; he likened the common law to an "arsenal of sound common sense principles."[1] No end of examples of this characteristic might be given. He had a marked aversion to artificial and technical construction. In speaking of the standard to be used in weighing the evidence in a case involving the question whether a certain hospital was an "annoyance" to the inhabitants of neighboring houses within the meaning of a covenant in a building lease, he said: —

"'Annoyance' is a wider term than nuisance, and if you find a thing which really troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house, — if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment or discomfort. You must take sensible people; you must not take fanciful people on the one side or skilled people on the other; and that is the key as it seems to me of this case. Doctors may be able to say, and, for anything I know, to say with certainty, that there is no sort of danger from this hospital to the surrounding neighborhood. But the fact that some doctors think there is, makes it evident at all events that it is not a very unreasonable thing for persons of ordinary apprehension to be troubled in their minds about it. And if it is not an unreasonable thing for any ordinary person who lives in the neighborhood to be troubled in his mind by the apprehension of such risk, it seems to me that there is danger of annoyance, though there may not be a nuisance."[2]

Along with his singular power of expression Lord Bowen displayed real imagination. Imagination, after all, is for the most part simply depth and breadth of insight; and so far from being detrimental to judicial thought, surely no quality could be more desirable in the administration of law than the intellectual and imaginative insight which goes to the heart of things and expresses

[1] Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 611.

[2] Tod-Heatly *v.* Benham, 40 Ch. D. 97. See also Jackson *v.* Barry Ry. Co., [1893] 1 Ch. 238, and Miller *v.* Hancock, [1893] 2 Q. B. 180.

in perfect form a rule for future guidance. Undoubtedly, in much of Lord Bowen's work as a judge no such great powers were called into play; but in those great cases where the discussion goes to the scientific and historical foundation of legal principles we witness the luminous effect of a powerful imagination at work among the dry bones of legal formulæ.

One may regret that Lord Bowen's labors did not fall into lines which would have given more general scope to his high powers; but, from all that I have been able to learn of his character, I am sure that he would consider his laborious life amply rewarded by the tribute of his friend and colleague, Mr. Justice Wright, who said that "he fulfilled the highest ideal of public justice."

Van Vechten Veeder.

CHICAGO, 1896.